Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-1110

In The

Supreme Court of the United States

October Term, 1975

ANTHONY J. BUFFA, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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UNITED STATES OF AMERICA

PETITION FOR REHEARING

Anthony J. Buffa, the petitioner, in this proceeding, respectfully petitions for rehearing of the order of the Court entered on the nineteenth day of April, 1976, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

This petition is made on the grounds that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision[1] (Rule 19 of the Supreme Court). Said grounds are confined to intervening circumstances of substantial and controlling effect.

[1]A ground for the Petition for Certoriari heretofore filed herein is that the Court of Appeals deliberately and knowingly misstated facts which appear on the face of the record, i.e., the Petitioner had been convicted of violating Sections 472 & 473 of Title 18 when, in fact, Petitioner had also been convicted of violating Section 2 of Title 18. By such misstatement, the Court of Appeals buried the question of whether or not a charge to the jury as to both parts of Section 2 constituted reversible error. This is a new question of national importance which has not been decided by the Supreme Court.

The following misconduct, which calls for the exercise of the Supreme Court's power of supervision and which was knowingly calculated to prejudice petitioner, occurred in the Court of Appeals after the Petition for Certiorari had been docketed.

On February 5, 1976, the same day this case was docketed in the Supreme Court, counsel for Petitioner wrote to the Court of Appeals for the Sixth Circuit requesting the clerk to certify and transmit the record to the Clerk of the Supreme Court as follows:

> "In Re: United States v. Buffa; Case No. 75-1322"
>
> "I have filed a Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit in the Supreme Court in the above entitled cause.
>
> "It is necessary that I have the Reporter's Transcript, Joint Appendix, and the judgment of the District Court certified and sent to the Clerk of the Supreme Court at this time.
>
> "It will be required by the Supreme Court when my Petition will be first considered there.
>
> Sincerely,
> James Easly"

Thereafter, counsel for petitioner, on February 11, 1976, called the Clerk's Office of the Court of Appeals and asked whether the certified record had been sent to the Supreme Court and was informed that it would be sent in the following two or three days.

The Petition for Certiorari was denied on April 19, 1976. Thereafter, it appears that the certified record was mailed to the Supreme Court.

References made in the Petition for Certiorari to the Reporter's Transcript (R.T.) appear on page 4 (R.T. p. 173, R.T. p. 174, and R.T. pp. 151-153).

On page 4 reference is made to Joint Appendix (J.A. 36a and 38a).

Although no one can say to what degree the lack of the certified record may have contributed to the denial of the Petition for Certiorari, nevertheless it is apparent that Petitioner has been deprived of a material and substantial right – the right to have his Petition for Certiorari considered with the certified record available for reference.

The conduct of the Court of Appeals in deliberately and knowingly not transmitting the certified record to the Supreme Court until after the Petition for Certiorari had been denied constitutes a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court's power of supervision.

In bringing this Petition for a Rehearing, counsel is well aware of the rule that denial of a Writ of Certiorari by the Supreme Court carries with it no implication whatever regarding its views of the merits of the case.

However, it is submitted that the above rule applies in the great majority of Petitions for Certiorari which are based on questions of law but that the rule should not apply in a case based on conduct of the Court of Appeals which calls for the exercise of the power of supervision.

Beyond doubt, the denial of a Petition for Certiorari founded on conduct calling for the exercise of the power of supervision does clearly and unmistakably carry with it the implication that the Supreme Court condones the conduct of the Court of Appeals. The reason is questions of fact are involved when the conduct of the Court of Appeals calls for the exercise of the power of supervision.

There should be no misunderstanding and no mistake as to the issues of fact involved in the case at bar. The conduct of the Court of Appeals must not be condoned by a denial of this Petition, for, in that case, all men of good will will raise the implication that the Supreme Court has condoned the conduct of the Court of Appeals.

It is, therefore, respectfully submitted that rehearing be granted upon the question of the conduct of the Court of Appeals and that upon rehearing a Writ of Certiorari issue, the judgment of the Court of Appeals and the judgment of conviction be reversed and the cause remanded for further proceedings.

JAMES EASLY
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

JAMES EASLY
Counsel for Petitioner

CERTIFICATE OF SERVICE

James Easly, a member of the Bar of the Supreme Court of the United States and counsel of record for Anthony J. Buffa, petitioner herein, hereby certifies that on May 11, 1976, pursuant to Rule 33, Rules of the Supreme Court, he served five copies of the foregoing Petition for Rehearing on the Solicitor General of the United States, Respondent herein, by depositing such with air mail postage prepaid, properly addressed to the post office address of the Solicitor General at Department of Justice, Washington, D. C. 20503.

JAMES EASLY
Counsel for Petitioner

STATE OF OHIO }
CUYAHOGA COUNTY } ss.: AFFIDAVIT

James Easly, being duly sworn, on oath, depones and says:

1.) On February 5, 1976, he wrote to the Clerk of the United States Court of Appeals for the Sixth Circuit requesting that the Reporter's Transcript, the Joint Appendix and the Judgment of the District Court of the case at bar, be certified and sent to the Clerk of the Supreme Court.

2.) On February 11, 1976, affiant on long distance telephone called the Clerk's office of the Court of Appeals and was assured that the certified record would be transmitted to the Supreme Court within two or three days.

3.) Affiant has been informed that the certified record was transmitted to the office of the Clerk of the United States Court of Appeals on April 22, 1976.

JAMES EASLY

SUBSCRIBED AND SWORN to this 11th day of May, 1976.

JULIA SECHI
Notary Public

My Commission Expires
November 14, 1980.